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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 657.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

versus

RILLA MAE FREEMAN, Administratrix, Etc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For Rilla Mae Freeman, Administratrix, Etc., Respondent, in Opposition.

G. ERNEST JONES, JR.,
Birmingham, Alabama,
Attorney for Respondent.

RODERICK BEDDOW,
G. ERNEST JONES, SR.,
204-211 Massey Building,
Birmingham, Alabama,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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BRIEF

For Rilla Mae Freeman, Administratrix, Etc., Respondent, in Opposition.

OPINION BELOW.

The opinion of the Court of Appeals for the Fifth Circuit was filed December 14, 1951, application for rehearing was denied January 18, 1952 (Rec. p. 244), and is reported in 193 Fed. 2d 217 (Fed. Rep. Sup., dated February 18, 1952).

STATEMENT OF THE MATTER INVOLVED.

The only matter involved in this case is whether or not the trial court correctly submitted the plaintiff's complaint to the jury and was correct in denying the defendant's motion for a new trial when judgment was rendered in favor of the plaintiff.

STATEMENT OF THE CASE BY THE RESPONDENT.

As its statement of the case this respondent adopts the findings of fact set out in the opinion of the Court of Appeals here sought to be reviewed as follows:

> "Appellee, as administratrix of her husband's estate, recovered judgment below against the appellant railroad awarding her damages for the husband's wrongful death, which occurred when an automobile driven by one Brock King, in which deceased was riding as a guest, collided with a train alleged to have been negligently operated by appellant.
>
> "The collision occurred about 8:22 a. m. on January 14, 1950, a foggy, misty morning, with light drizzling rain, where appellant's single main line track intersects a state highway at right angles near Powderly, Alabama, just outside the southerly city limits of Birmingham. The train was about 10 minutes behind schedule. The crossing is in semi-rural territory, but near several populous areas. The highway, which connects the towns of Midfield and Fairfield, is paved 21 feet wide and carries reasonably heavy traffic. At the crossing, there is a conventional crossarm crossing sign, plainly visible to a car approaching from the north, but no other protective devices.
>
> "The automobile in which deceased was riding approached the crossing from the north, traveling south

at a speed of 25 to 35 miles per hour. The train approached from the east, or left side of the automobile, at a speed of about 45 miles per hour. As it approached the crossing, the automobile did not reduce its speed. Although the engineer testified he applied the emergency brakes as soon as he discovered the oncoming automobile, the train's speed was reduced very little before the collision. The automobile had almost cleared the crossing when it was struck on its left rear by the left pilot step on the front of the locomotive. After striking the automobile, the engine became uncoupled from the cars, apparently as a result of the impact, and traveled about 600 feet beyond the crossing before stopping.

"The approaches to the crossing of both highway and railroad were straight. To one looking straight ahead down the highway, or straight down the railroad track, there is a clear view of the crossing itself from a substantial distance away. From the east, however, the railroad track approaches the crossing through a shallow 'cut,' on the sides of which are low banks. On the top of these banks, and in the area to the north and east of the crossing, there were trees and rather dense weeds and other growth, so that an automobile driver approaching the crossing from the north would not have a clear view of a train approaching from the east, nor would the engineer of the train have a clear view of the approaching automobile, until the train and automobile were quite close to the crossing. Even in winter, with foliage greatly reduced, the trunks of the trees and the stems of thickly grown weeds and bushes obscure the view to the northeast of the crossing, across which area the engineer and driver of the car would have to look in order to see each other a substantial distance back from the crossing.

"The engineer testified that he had a clear view of the crossing straight down the track from a quarter of a mile or more away, and started blowing a crossing signal and turned on the automatic bell ringer at about that point, continuing the signals until he reached the crossing. He was corroborated by several witnesses as to the crossing signals, but there was testimony to the contrary. The driver of a car following close behind the car involved in the collision heard the whistle, and safely stopped his car before reaching the crossing. The engineer further testified that he did not see the car involved in the collision until the car was between 50 and 75 feet, and the locomotive between 75 and 100 feet, from the crossing, at which time he applied the emergency brakes and did all in his power to stop the train. His failure to see the car earlier may have been due to the obstructing vegetation to the northeast of the crossing.

"The cause was submitted to a jury, which found for the plaintiff. Asserting that the negligence of the driver of the automobile, Brock King, was the sole proximate cause of the collision, appellant contends that its motion for a directed verdict, or in the alternative its motion for a new trial, should have been granted, and that denial of these motions was error."

At the conclusion of the evidence on the trial the petitioner filed a general motion for a directed verdict (Rec. p. 167) upon which the court reserved its ruling; there was no motion made by petitioner at the close of the evidence for a directed verdict, separately and severally, as to each separate and several ground contained in the complaint. After verdict and judgment for plaintiff, defendant's motion for new trial was overruled (Rec. pp. 193-194). The Court of Appeals held no error in trial court's submission of case to jury.

STATEMENT OF THE PLEADINGS AND THE EVIDENCE.

This cause was tried in the court below upon the original complaint, containing four counts, two of which charged simple negligence, and, by operation of law, subsequent negligence, one of which charged subsequent negligence and one of said counts charged wantonness (Rec. pp. 1, 2, 3, 4, 5). The appellant's answer to the separate and several counts of the complaint set forth three separate and several defenses (Rec. pp. 6-7). Appellant's first defense was that the complaint failed to state a claim against the defendant; the second defense admitted that appellant was a corporation and that on, to-wit, the 14th day of January, 1950, a collision took place between an automobile of which the deceased, Murphy Hill Freeman, was an occupant, and appellant's train, being operated by its employees, at the place where a public road, generally known as "Midfield Road," crosses appellant's tracks in Jefferson County, Alabama, and that in said collision Murphy Hill Freeman received injuries from which he died a short time thereafter on January 14, 1950. The appellant, in the second defense, denied all other allegations contained in the complaint and the several counts thereof. The appellant's third defense was that appellee's intestate was guilty of contributory negligence which proximately contributed to cause his injury and death.

The evidence adduced upon the trial of this cause tended to show that the death of the appellee's intestate, Murphy Hill Freeman, resulted from a collision occurring on January 14, 1950, at approximately 8:22 a. m., between a locomotive and train of cars owned and operated by the appellant, Atlantic Coast Line Railroad Company, and an automobile in which the deceased was riding as a passenger (Rec. p. 26); that the collision occurred at a point where the appellant's railroad tracks cross the Midfield-

Fairfield Highway, a public crossing in Jefferson County, Alabama, used with great frequency at all times by the general public (Rec. pp. 24-25-26, 33, 42-43-44-45); that the point on the appellant's tracks where the fatal collision occurred is between the City of Birmingham and the City of Bessemer and just barely without the corporate limits of the City of Birmingham; that the Midfield-Fairfield Highway is a paved highway (Rec. p. 24) leading in one direction from the crossing to the Bessemer-Birmingham Super-Highway and thence to Fairfield and in the opposite direction to Powderly and the South Bessemer Highway (Rec. p. 25); that the crossing is surrounded by populous communities (Rec. pp. 42, 33, 23, 44); that there was a factory located nearby (Rec. p. 62). The character of the crossing was not made an issue by appellant upon the trial of this cause as the appellant conceded that it was a populous crossing, used with great frequency by the traveling public, and had been so used for a long time prior to the date of the collision in question (Rec. p. 45). The trial judge so ruled and in this ruling the appellant acquiesced. No testimony was introduced to the contrary and no contention to the contrary was made upon the trial.

The train consisted of a locomotive and three cars, a mail and express car, a passenger and baggage car and a passenger car. The engine was in the neighborhood of sixty or sixty-five feet long and the cars were each seventy feet long (Rec. pp. 146, 142). At the time of the collision appellant's train was traveling from Birmingham to Bessemer (Rec. p. 69), and the automobile in which appellee's intestate was riding as a passenger was traveling on the Midfield-Fairfield Highway from the direction of Midfield, the Birmingham-Bessemer Highway and Fairfield and approached the crossing on the engineer's side, or right side of the locomotive (Rec. pp. 72, 137). The appellant's railroad track, at the point where the collision occurred, crosses the highway at a right angle (Rec. pp. 69, 138).

The undisputed evidence was that the left pilot step of the locomotive hit the extreme rear end of the automobile (Rec. pp. 77, 105); that the automobile in which appellee's intestate was riding as a passenger was almost completely across appellant's railroad tracks when the collision occurred (Rec. p. 60).

Mr. Herbert Foster testified that he was a resident of 325 McPherson Avenue in Midfield and had been a resident of Jefferson County for approximately one year prior to the collision and was employed by the United States Department of Agriculture (Rec. p. 27). This witness further testified that immediately prior to and at the time of the collision he was behind the automobile in which appellee's intestate was riding, following it at a distance of from fifty to seventy-five feet (Rec. p. 29); that the automobile was approximately one hundred feet from the railroad tracks when he first observed it and that the train was around two hundred feet from the crossing when he first observed the train prior to the collision. This witness further testified that when he first saw the train two hundred feet from the crossing the automobile occupied by deceased was around fifty feet from the crossing and was traveling around fifteen or twenty miles an hour and did not increase or decrease its speed at any time from the first time he observed the automobile until the time of the collision (Rec. p. 30). This witness testified further that the train did not reduce its speed at any time prior to the collision from the time he first observed the train until the time of the impact and that the automobile had just almost made it across the track when the collision occurred (Rec. p. 31). According to the testimony of the witness the automobile came to rest around seventy-five to one hundred feet from the crossing after the collision (Rec. p. 32). According to the further testimony of Mr. Foster it was, at the time of the collision, drizzling rain and foggy to a certain extent (Rec. p. 32). Mr. Foster testified that

his attention was first attracted to the train by a blast of the whistle and that he did not hear the whistle blow prior to that time (Rec. p. 34). He testified that there was no wig-wagger or flasher protecting the crossing and no lights or other indication of danger other than a cross and that he did not hear the bell on the train ring at any time (Rec. p. 37). According to the witness the train was two hundred feet from the crossing at the time when the automobile was fifty feet from the crossing and when he heard the train whistle blowing for the first time the automobile was fifty feet from the crossing (Rec. p. 49).

Sylvester Penny, upon being called as a witness by the plaintiff, testified that at the time of the collision he was near the crossing, walking along the railroad tracks. This witness testified that prior to the collision he had walked up the tracks in the direction from which the train approached the crossing about seventy-five or eighty feet on the engineer's side and that upon observing the train approaching him, he crossed over to the fireman's side of the track and observed the collision (R. p. 47). According to the testimony of Sylvester Penny, after the train passed he heard the whistle blow several times real fast like, "toot, toot, toot, something like that" and turned around (Rec. p. 50) and saw the automobile tumbling (Rec. p. 48). This witness testified that he had formerly worked for the railroad and was familiar with the noise or racket that brakes made when they are applied upon trains (Rec. p. 48), and that he did not hear the brakes applied at any time from the time he first saw the train until the time when he saw the automobile tumbling. The witness stated that he was standing about five feet from the tracks as the train passed him and was walking along just in the clearance where the train could pass him (Rec. p. 53). He testified further that he did not hear any bell on the engine ring prior to the collision (Rec. pp. 48, 55). According to this witness he went back to the scene of the

collision after the collision and rendered whatever assistance he was able to give and that during the time he was there at the scene, after the collision occurred, the train was backed up from the point where it had come to a stop after the collision and that he heard the bell ring, while the train was being backed, for the first time (Rec. p. 55). The train was backed up, according to the witness, before the highway patrolmen came to investigate the collision (Rec. p. 55).

Mr. Joe H. Seales, upon being called as a witness for plaintiff, testified that he was a resident of Jefferson County, Alabama, and was employed as department Manager for Union Supply Company (Rec. p. 58); that on the morning of the collision he was approaching the crossing and was approximately two hundred feet from the crossing when the collision occurred (Rec. p. 59). This witness testified that he did not see the automobile prior to the collision but did see the collision and that the automobile was almost across the track when the train struck the automobile near the back, the left side of the train hitting the extreme rear of the automobile. The witness testified that he had very little opportunity to observe the train prior to the collision but did observe it during the last thirty or forty feet of travel before the impact, during which time the train did not at any time slacken or reduce its speed (Rec. p. 60). According to the testimony of this witness the weather was misty and rainy and somewhat foggy at the time of the collision (Rec. p. 61).

In answer to interrogatories propounded by appellee to the appellant, appellant admitted, among other things, that about 9:33 a. m. (8:22 Central Standard Time) the train operated by the appellant reached the point where the Midfield-Fairfield Highway crossed the appellant's tracks, that being the point where the collision occurred (Rec. p. 67); that the train was a scheduled train (Rec. p. 69),

traveling away from Birmingham at the time of the collision, and that the distance from the regular station in Birmingham to the point where the collision occurred is approximately five miles; that the train was running in the direction of Bessemer (Rec. p. 69). According to appellant's answers to appellee's interrogatories the train involved in the collision was scheduled to depart from the Birmingham station at 9:00 a. m. and actually departed about 9:10 a. m. (8:00 a. m. and 8:10 a. m., respectively, Central Standard Time) (Rec. p. 70). The collision occurred at 9:22 a. m. (8:22 Central Standard Time) according to appellant's answers (Rec. p. 71).

Appellant's answer to appellee's interrogatories further state that the highway is about twenty-one feet wide at the point where the collision occurred and that the point of the collision was on the right side of the highway facing in the direction in which the automobile was traveling and to the left of the center line of the railroad tracks facing in the direction in which the train was traveling and that the automobile approached the crossing on the engineer's side of the train, the engineer's side being on the right side as one sits in the locomotive facing the front of the locomotive (Rec. p. 72). According to further answers of appellant to appellee's interrogatories, the engineer operating the locomotive at the time of the collision saw the automobile before the automobile reached the crossing when the automobile was about seventy-five to one hundred feet from the point where the railroad track and the highway cross each other, at which time the pilot of the locomotive was about seventy-five feet from the boundary of the crossing nearest the locomotive and approximately eighty-six feet from the center of the crossing (Rec. p. 73). No other employee of the defendant saw the automobile prior to the collision (Rec. p. 74). According to the appellant's answers, the locomotive and train

was traveling between forty-five and fifty miles per hour prior to the collision and did not decrease its speed before colliding with the automobile occupied by deceased (Rec. p. 76); the automobile was demolished and came to rest approximately seventy-five feet from the center of the crossing and between ten and twelve feet from the center of the appellant's railroad tracks (Rec. p. 78); the engineer continued to observe the automobile from a point when the automobile was seventy-five to one hundred feet from the crossing until immediately prior to the collision, during which time, according to appellant's answers to appellee's interrogatories, the automobile continued traveling at a rate of approximately forty miles per hour without reducing its speed between the time when the engineer first saw it and when he last saw it prior to the collision (Rec. pp. 76, 82, 87). The engineer, according to appellant's answers, had a full view of the crossing for at least a quarter of a mile before entering the crossing (Rec. p. 83). According to appellant's answers to appellee's interrogatories, the locomotive first came to a full stop a little more than four hundred feet from the center of the crossing (Rec. p. 77), and prior to the collision the engineer rang the bell and sounded the whistle of the locomotive when the front of the engine was about twelve hundred forty feet from the crossing until the engine was passing the crossing (Rec. p. 86).

In answer to interrogatories numbered 36 (a) and (b) the appellant stated:

> "The engineer did not notice the facial expression of the driver, as the train was traveling between 45 and 50 miles an hour, and the automobile was traveling about 40 miles an hour. The engineer saw the driver continue to drive at about the same rate of speed from the time the engineer first observed the driver until the engineer last observed the driver" (Rec. p. 87).

And in answer to appellee's interrogatory numbered 36 (c), which was as follows:

> "State each and everything done by the engineer operating your locomotive for a distance of one-fourth of a mile before reaching the point where said collision occurred,"

appellant stated:

> "When the front of the engine was about 1,240 feet from the crossing the engineer put the automatic bell into operation and at the same time commenced sounding the regular crossing whistle which consists of two longs, a short, and a long. The engineer continued to sound the whistle and ring the bell from that point—about 1,240 feet from the crossing—until the engine was passing the crossing" (Rec. p. 88).

J. A. Neal, called as a witness on behalf of appellant, testified that he arrived at the scene after the collision had occurred and did not see the collision but heard the train whistle start blowing as he was crossing the A. G. S. railroad tracks located about two blocks from the appellant's tracks and separated by a hill situated in between the two tracks (Rec. p. 91). He testified that he heard four long blasts and two short ones and then heard two short blasts of the whistle after the regular crossing blast and that when he arrived at the top of the hill the train had already passed the crossing and had stopped before he arrived at the railroad tracks. He stated that he did not see the train stop and did not know how far down the track from the crossing the train traveled before coming to a stop (Rec. pp. 92, 93).

Walter Johnson, upon being called as a witness by the appellant, testified that he was brakeman on the appellant's train at the time of the collision and had been employed by the appellant for twenty-nine years. He testi-

fied on behalf of the appellant that he was familiar with the Midfield crossing (Rec. p. 95) and that at the time of the collision the appellant's locomotive and railroad train was going out of Birmingham and that the weather was slightly foggy and cloudy; that he was in the front part of the second car from the engine and heard the whistle prior to the collision sound the regular crossing signal (Rec. p. 96) before the train reached the Midfield crossing. He testified that he then heard the whistle blow the emergency signal, warning that something was wrong with the train and that the train went into emergency and that the next thing he knew he heard the fragments of the car on the side of the train (Rec. p. 97). According to this witness the emergency brakes were not applied until "just about the time the warning signal was going on the brakes went on" (Rec. p. 98). According to this witness' testimony on cross-examination, when the emergency brake is applied on a train the train will immediately, and without any hesitation, begin to slacken its speed. The witness testified that in his opinion the train was traveling between thirty-five and forty miles per hour (Rec. p. 100); that the train, after the accident, was backed up toward the highway and before being backed the rear of the train was three hundred to four hundred feet from the crossing and was right on the switch or by the switch; that the engine was uncoupled from the train (Rec. p. 102) and was five hundred or six hundred feet ahead of the train (Rec. p. 103). Appellant's witness, Walter Johnson, further testified that the engine was recoupled to the cars and the train was backed up somewhere between six and eight minutes, maybe ten minutes after the collision and the train remained at the scene approximately fifty minutes before departing (Rec. p. 103). He further stated that upon a disconnection or upon the cars becoming uncoupled from the engine, the emergency brakes upon the locomotive and the cars will automatically be applied in emergency position (Rec. p. 102).

Appellant offered into evidence four photographs depicting the crossing at the time of the collision (Rec. p. 105).

Appellant called as a witness C. D. Turner, an employee of the State of Alabama Highway Department, who testified that he received notice by radio at 8:35 a. m. that the collision had occurred at 8:31 a. m. (Rec. p. 114); that he thereupon went to the scene of the accident and upon arriving there he made measurements, in the course of his investigation, of the relative positions of the physical objects which he found at the scene upon his arrival. The witness testified that according to his measurements the train traveled three hundred feet after the impact with the automobile and the top of the car was knocked two hundred four feet and the car was knocked ninety feet (Rec. p. 110). These measurements were made by the witness from the positions of the objects after he arrived at the scene and were made with a tape measure (Rec. p. 111).

J. B. Renfroe, called on behalf of the appellant, testified that he was conductor on the train involved in the collision (Rec. p. 117); that he recalled the collision in question and was in the third car from the engine at the time thereof and heard the train whistle sound the regular crossing blow, which is two longs, a short and a long, prior to the collision and then the whistle stopped blowing the regular crossing blow, and before the last long blow was finished started making some short blasts; that the train went into emergency at the time the short blasts started and he jumped up and ran out on the baggage car as soon as he could to see what was wrong and saw the automobile (Rec. p. 116). He testified that the train was ten minutes late (Rec. p. 118); that he later observed the injury to the locomotive and that the left sill step on the side of the pilot and at the rear was bent (Rec. p. 120); that the step and the lever on the back of the tank was also

injured (Rec. p. 122). The witness testified that he did not hear any bell ring prior to the collision (Rec. p. 123). According to the witness the engine became uncoupled from the cars and came to a stop approximately fifty feet beyond the cars, the front of the engine being around six hundred feet from the crossing at the time and the rear of the last car being around 300 feet from the crossing when it came to a stop. The witness testified that the train remained at the scene approximately fifty minutes; that during that time the engineer did recouple the engine to the cars but he denied that the cars were backed up in the direction of the crossing (Rec. p. 125).

H. D. Rabon, flagman on the train involved in the collision in question, testified on behalf of appellant that he was in the second car from the engine taking care of his reports at the time of the collision (Rec. pp. 126-127). He testified that he heard the regular crossing whistle, followed immediately by a short sound of the whistle; that about that time the train went into emergency and he heard something hit (Rec. p. 127). He further testified that he heard the bell ring before the train reached the crossing (Rec. p. 128). That immediately upon the train going into emergency he felt a jolt or a jar indicating a collision (Rec. p. 130). The witness admitted that he did not tell the Trainmaster, when being questioned by him on the 14th day of January, the day of the accident, that the bell was ringing (Rec. p. 130). According to the witness the train was traveling at a rate of speed between forty and forty-five miles per hour and it was a cloudy day and drizzling rain at the time of the collision (Rec. p. 132).

Walter Hugh O'Neal testified that he was the engineer on the train involved in the collision in question (Rec. p. 133); that on the morning when the collision occurred it was misty and rainy and there were clouds; that on a

clear day he would have a view of the crossing for about a mile before reaching the crossing, but at the time in question he had a plain view of the crossing for a quarter of a mile or more; that upon approaching the crossing he was looking straight ahead down the track for a distance of one-half mile before reaching the crossing and continued to travel at a rate of speed between forty-five and fifty miles an hour (Rec. p. 134) as he approached the crossing (Rec. p. 135). The witness testified that the bell was ringing automatically prior to the collision and that the whistle was blowing (Rec. pp. 136, 137). The engineer further testified that as he approached the crossing he observed the automobile occupied by the deceased between fifty and seventy-five feet from the crossing, approaching the crossing from his right and traveling at a rate of speed near forty miles an hour without either increasing or decreasing its speed as it drove on toward the crossing (Rec. pp. 137, 138). According to the testimony of the engineer the train was between seventy-five and one hundred feet from the crossing, traveling between forty-five and fifty miles per hour, when he first observed the automobile (Rec. p. 138). The engineer further testified that upon noticing the automobile continue to proceed toward the crossing without decreasing its speed he had his hand on the whistle cord, blowing the last blast of the whistle, and, from all indications, the driver of the automobile did not hear it and he began sounding the alarm blast, which is a succession of short blasts, and continued pulling the whistle with left hand and reached over with his right hand and applied the emergency brakes. He testified that all that was necessary for him to do to throw the train into emergency was to move the brake valve around to emergency position. The brake valve being a lever that is located on top of the automatic brake valve and to put it into emergency it is only necessary to pull it to the emergency position, according to this witness' testimony (Rec. pp. 139, 140). The engineer testified that the train came

uncoupled as the result of the collision and that he backed up the engine to the train and coupled it (Rec. p. 141); that the rear of the train was between three and four hundred feet from the crossing when it came to a full stop after the collision (Rec. p. 142). According to the testimony of the engineer the uncoupling of the train would automatically throw the train into emergency (Rec. p. 153). The engineer testified that he continued working steam as he approached the crossing until the moment of the collision and that working steam would help maintain the speed of the train (Rec. pp. 153, 154). The engineer testified that an inspection of the locomotive after the collision disclosed that the back tank step was bent and the lift lever which lifts the pin to uncouple the engine tank from the coaches was bent (Rec. p. 150). He also testified that he had been operating trains over the Midfield-Fairfield Highway crossing since 1928 (Rec. p. 145).

R. O. Watts testified on behalf of appellant that the whistle post for the Midfield-Fairfield Highway crossing in the direction from which the train approached the crossing is located by measurement one thousand three hundred thirty-four feet and five inches from the crossing (Rec. p. 156).

J. L. Hufham, an employee of the appellant, testified that he was mechanical examiner for the appellant (Rec. pp. 157, 158) and that the human reaction time for the application of the emergency brake on a locomotive is variable; that it takes some people longer to apply the emergency brakes by pulling the emergency brake lever than it does others, but that he used two seconds in his formula for arriving at distance which would be required to stop a locomotive under various conditions (Rec. p. 162). Hufham testified that the mechanical reaction that is required for the brakes to be applied completely throughout the train from the time the engineer pulls the

emergency brake lever into emergency position would be about two seconds on a three-coach passenger train traveling at a rate of forty-five miles an hour on a level, or practically level track, just slightly upgrade, drawn by a 1600 class locomotive (Rec. pp. 163, 164, 165). The witness Hufham further testified that in his opinion after the brakes were applied, a train consisting of a 1600 class locomotive and three coaches, traveling at a rate of forty-five miles per hour, would travel five hundred eighty-one feet before coming to a full and complete stop (Rec. p. 161).

Certain photographs of the scene of the accident were also introduced as exhibits and were certified to the Court of Appeals separately from the printed record. The Court of Appeals has incorrectly recited the facts established by these photographs.

POINTS OF LAW.

I.

Where lower Federal Courts are applying local laws, the Supreme Court will not set aside their ruling, except on a plain showing of error.

Palmer v. Hoffman, 63 Sup. Ct. Rep. 477, 318 U. S. 109, 87 L. Ed. 645.

II.

Supreme Court does not grant certiorari to Court of Appeals to review evidence and to discuss specific facts.

U. S. v. Johnson, 45 Sup. Ct. 496, 268 U. S. 220.

III.

In dealing with issues of state law that enter into judgments of Federal Courts, the Supreme Court is hesitant to overrule decision by Circuit Court of Appeals on the law of particular states, unless their conclusions are shown to be unreasonable.

Graver Tank & Mfg. Co. v. Linde Air Products Co., 69 Sup. Ct. 535, 538, 336 U. S. 271;

Propper v. Clark, 69 Sup. Ct. 1333, 1341, 1342, 337 U. S. 472;

Anderson v. Abbott, 64 Sup. Ct. 531, 535, 321 U. S. 349;

Brewer Oil Co. v. United States, 43 Sup. Ct. 60, 63, 260 U. S. 77, 86;

Alabama Power Co. v. Ickes, 58 Sup. Ct. 300, 302 U. S. 464;

Baker v. Schofield, 37 Sup. Ct. 333, 333, 244 U. S. 144.

"The opinion of the Court of Appeals and the trial court being rendered by judges who are constantly

required to pass upon Alabama law questions will not be disturbed unless the Supreme Court can say with certainty that they are incorrect."

Spiegel's Estate v. C. I. R., 69 Sup. Ct. 301, 304, 335 U. S. 701.

IV.

Counts of a complaint charging simple negligence authorize a recovery on evidence of subsequent negligence after discovery of peril.

Miles v. Hines, 205 Ala. 83, 87 So. 837;
Central of Ga. R. R. Co. v. Foshee, 125 Ala. 199;
Brown & Flowers v. Central of Ga. R. R. Co., 197 Ala. 71, 72 So. 366.

V.

The negligence of the driver of an automobile is not imputable to passengers.

Frierson v. Gulf, Mobile & Ohio R. R. Co., 48 So. (2d) 170.

VI.

In the trial of a cause any material facts admitted by counsel may be the ground of the Court's procedure equally as if established by the clearest proof.

France Manufacturing Co. v. Jefferson Electric Co., 106 Fed. (2d) 605, Cert. Den. 60 Sup. Ct. 471, 309 U. S. 657, 84 L. Ed. 1006, Rehearing denied 60 Sup. Ct. 589, 309 U. S. 696, 84 L. Ed. 1036;
Fontes v. Porter, 156 Fed. (2d) 956;
Kansas City Life Ins. Co. v. Bowns, 129 Fed. (2d) 289;
Conn v. Penn, 18 U. S. 424, 5 Wheat. 424, 5 L. Ed. 125;

General Electric Co. v. Wagner Electric Manufacturing Co., 123 Fed. 101, Affmg. 130 Fed. 772, 66 C. C. A. 82.

VII.

On defendant's appeal from judgment for plaintiff, the evidence and inferences deducible therefrom are viewed most favorably to plaintiff, and the reviewing court will not weigh the evidence, but is required to assume as established all facts that the evidence introduced upon the trial supporting plaintiff's claim, reasonably tended to prove, and inferences fairly deducible from the evidence are to be drawn in plaintiff's favor.

Maryland Casualty Co. v. Cushing, 171 Fed. (2d) 257;

Chicago Great Western Ry. Co. v. Beecher, 150 Fed. (2d) 394, Cert. Den. 66 Sup. Ct. 339, 326 U. S. 781, 90 L. Ed. 473;

Atlantic Greyhound Corp. v. Crowder, 177 Fed. (2d) 820.

VIII.

The testimony of a witness who was in a position where he would, in all probability, have heard the bell ringing, if it had been ringing, that he did not hear the bell ring is of sufficient probative value to take the issue to the jury.

Wigmore on Evidence, 3rd Ed., Vol. 11, Sec. 664, p. 778, 1947 Pocket Supp. to Vol. 11, p. 119;

Union Pacific Ry. Co. v. Burnham, 124 Fed. (2d) 500;

Louisville & Nashville R. Co. v. York, 128 Ala. 305, 30 So. 676 (12);

Nashville, C. & L. Ry. v. Prince, 103 So. 463, 212 Ala. 499;

Grand Trunk Western Ry. Co. v. Heatlie, 48 Fed. (2d) 759;

Chicago & N. W. Ry. Co. v. Golay, 10th C. C. A., 155 Fed. (2d) 842.

IX.

It is a breach of duty for an engineer to operate a locomotive and train of cars over a public crossing at a high rate of speed if he knows that the use of the crossing by the public is so frequent and constant as that people or property are likely, probably, in an exposed position at or about the crossing; and where there was evidence that such public crossing was used with great frequency by the general public, and that the engineer had been operating trains over such crossing for approximately twenty-three years, and evidence showed that the approach to the crossing was obscured to the engineer's view, evidence that locomotive and train of cars were traveling forty-five to fifty miles per hour was sufficient to make a jury question of whether the defendant was guilty of negligence or wantonness in approaching the crossing at a high and dangerous rate of speed.

Atlantic Coast Line R. Co. v. Brackin, 28 So. (2d) 193;
Pollard v. Stewart, 168 So. 203, 27 Ala. App. 116, Cert. Den. 168 So. 205, 232 Ala. 453;
Alabama Great Southern v. Moundville Motor Co., 4 So. (2d) 305, 241 Ala. 633;
Miles v. Hines, 205 Ala. 83, 87 So. 837;
Louisville & Nashville R. R. Co. v. Sullivan, 13 So. (2d) 877, 880, 244 Ala. 485;
Grauer v. Alabama Great So. R. Co., 96 So. 915, 209 Ala. 568;
44 Am. Juris. 753, p. 512;
44 Am. Juris. 747, p. 507;
Mobile J. & K. C. R. Co. v. Smith, 153 Ala. 127, 45 So. 57, 127 Am. St. Rep. 22;
Highland Ave. Belt R. Co. v. Robbins, 124 Ala. 113 27 So. 422, 82 Am. St. Rep. 152.

X.

The evidence presented a question properly for the jury as to the negligence of the engineer after the discovery of intestate's peril as being the proximate cause of the collision and the resulting death of appellee's intestate.

Alabama Great Southern R. R. Co. v. Bolton, 7 So. (2d) 296, 242 Ala. 562;
Alabama Great Southern R. R. Co. v. Moundville Motor Co., 4 So. (2d) 305, 241 Ala. 633;
Southern Ry. Co. v. Sherrill, 167 So. 731, 232 Ala. 184;
Louisville & Nashville R. R. Co. v. Calvert, as Admr., 172 Ala. 597, 55 So. 812;
Thompson & Donahoo v. Mobile & O. R. Co., 211 Ala. 646, 101 So. 441;
Southern Ry. Co. v. Williams, 243 Ala. 429, 10 So. (2d) 273;
Louisville & Nashville Ry. Co. v. Sullivan, 13 So. (2d) 877, 244 Ala. 485;
Central of Ga. Ry. v. Ellison, 199 Ala. 571, 75 So. 159;
Southern Ry. Co. v. Shelton, 136 Ala. 191, 34 So. 194;
Williams v. Roche Undertaking Co., 49 So. (2) 902;
Louisville & Nashville Ry. Co. v. Lloyd, 186 Ala. 119, 6 So. 153;
Miles v. Hines, 205 Ala. 83, 87 So. 837;
Southern Ry. Co. v. Dear, 26 Ala. App. 508, 162 So. 685;
Pollard v. Nicholls, 99 Fed. (2d) 955, 65 So. 153;
Randle v. Birmingham Ry., Light & Power Co., 185 Ala. 532, 48 So. 114.

XI.

Wantonness may arise from knowledge that persons, though not seen, are likely to be in a position of danger and with conscious disregard of known conditions of

danger and may arise after discovery of actual peril by a conscious failure to use preventive means at hand.

Wilhite v. Webb (Ala.), 46 So. (2d) 414;
Louisville & Nashville R. R. Co. v. Sullivan, 13 So. (2d) 877, 244 Ala. 485;
Southern Ry. Co. v. Shelton, 136 Ala. 191, 34 So. 194;
Miles v. Hines, 205 Ala. 83, 87 So. 837.

XII.

Where the engineer admitted knowledge of the perilous situation and testified to making due effort to stop the train, the failure of the engineer to check its speed before the collision and the distance the train ran after the event, together with the other facts and circumstances in evidence, were sufficient to warrant the inference by a fair jury that the engineer did not use reasonable care to avoid the collision after discovering the peril where the difference of a fraction of a second would have enabled appellee's intestate to arrive at a place of safety.

Pollard v. Nicholls, 99 Fed. (2d) 955;
Chesapeake & O. R. Co. v. Meyer, 150 Va. 656, 143 S. E. 478;
Chicago, M. & S. P. R. Co. v. Winstanley, 73 Wisconsin 375, 39 N. W. 856;
Central of Ga. R. Co. v. Forshee, 125 Ala. 199, 217, 27 So. 1006, 1013.

XIII.

Where a complaint contains several counts or causes of action and a general motion for a directed verdict is made by defendant, the only question raised is whether there was sufficient evidence to support the jury's verdict on any of the charges, counts, or causes of action contained in the complaint.

Palmer v. Hoffman, 63 S. Ct. 477, 318 U. S. 100;
Kinser v. Riss & Co., 177 Fed. (2d) 316, 317;

Miller v. Advanced Transportation Co., 126 Fed. (2d) 442;

Washington Asphalt Block & Tile Co. v. Mackey, 15 App. D. C. 410;

Starr Jobbing House v. May Hosiery Mills, 93 So. 572, 207 Ala. 620;

Cross v. Ryan, 124 Fed. (2d) 883, 887;

Larson v. Chicago & N. W. Ry. Co., 171 Fed. (2d) 841, 64 C. J. 1081;

Greyhound Lines v. Callahan, 13 So. (2d) 660, 244 Ala. 449;

Bessemer Liquor Co. v. Tillman, 139 Ala. 462, 36 So. 40.

XIV.

The duty of the engineer arose immediately on the discovery of the peril of plaintiff's intestate.

Louisville & N. R. Co. v. Calvert, 172 Ala. 597, 55 So. 812;

Thompson v. Mobile & O. R. Co., 211 Ala. 646, 647, 101 So. 441;

Louisville & N. R. Co. v. Young, 153 Ala. 232, 236, 45 So. 238, 239, 16 L. R. A. (N. S.) 301;

Mobile L. & R. Co. v. Logan, 213 Ala. 672, 674, 106 So. 147, 149;

Johnson v. Louisville & N. R. Co., 227 Ala. 103, 110, 148 So. 822, 828.

XV.

Failure to give quick loud blast of whistle is sufficient to take case to jury.

Snider v. Ala. G. S. R. Co., 210 Ala. 119, 122, 97 So. 209, 210;

Mobile L. & N. R. Co. v. Gadik, 211 Ala. 582, 584, 100 So. 837;

Manley v. B. R. L. & P. Co., 191 Ala. 531, 534, 68 So. 60;

Louisville & N. R. Co. v. Rush, 22 Ala. App. 195, 114 So. 21, 22.

XVI.

Failure to decrease speed fraction of a second may constitute subsequent negligence.

Louisville & N. R. Co. v. Scott, 23 Ala. App. 132, 122 So. 184, 185;

Central of Ga. Ry. Co. v. Foshee, 125 Ala. 199, 221, 27 So. 1006;

Louisville & N. R. Co. v. Robinson, 141 Ala. 325, 331, 37 So. 431, 432;

Seaboard Air Line R. Co. v. Laney, 199 Ala. 654, 657, 75 So. 15;

Randle v. B. R. L. & P. Co., 158 Ala. 532, 535, 48 So. 114;

Sands v. Louisville & N. R. Co., 156 Ala. 323, 326, 47 So. 323;

So. & No. Ala. R. Co. v. Sullivan, 59 Ala. 282.

XVII.

Although engineer may have kept proper lookout and given proper signals, yet the jury might reasonably infer that he made no effort to reduce speed of train.

Central of Ga. R. Co. v. Bates, 225 Ala. 519, 521, 144 So. 9, 11;

Southern R. Co. v. Dear, 26 Ala. App. 508, 162 So. 685.

XVIII.

Damages under Homicide Act are purely punitive, whether the conduct causing liability is simple or subse-

quent negligence or wanton, willful, or intentional conduct, and is matter for the jury.

Richmond & D. R. Co. v. Freeman, 97 Ala. 289, 292, 11 So. 800;

Kansas City, M. & B. R. Co. v. Sanders, 98 Ala. 293, 309, 13 So. 57;

Alabama G. S. R. Co. v. Frazier, 93 Ala. 45, 51, 9 So. 303, 30 Am. St. Rep. 28;

Alabama Power Co. v. Goodwin, 210 Ala. 657, 658, 99 So. 158;

Birmingham R. L. & P. Co. v. Rutledge, 142 Ala. 195, 204, 39 So. 338;

Ala. G. S. R. Co. v. Sellers, 93 Ala. 9, 15, 9 So. 375, 30 Am. St. Rep. 17.

ARGUMENT.

A.

Petitioner invokes the discretionary power of the Supreme Court to issue writ of certiorari pursuant to provisions of Section 1254 (1) of Title 28, United States Code, pursuant to Rule 38, Para. 5, second clause of subdivision (b), reading as follows:

> "Where a Circuit Court of Appeals has . . . decided an important question of local law in a way probably in conflict with applicable local decisions."

The decision of the Court of Appeals sought to be reviewed decided that:

> "As there is credible evidence to support a finding of negligence on the part of the defendant, the trial court was correct in submitting the matter to the jury and in denying the motion for new trial. Miller v. Union Pac. R. Co., 290 U. S. 227, 54 S. Ct. 172, 78 L. Ed. 285; Alabama Great Southern R. Co. v. Moundville Motor Co., 241 Ala. 633, 4 So. 2d 305; Alabama Great Southern R. Co. v. Bolton, 242 Ala. 562, 7 So. 2d 296; Southern Ry. Co. v. Sherrill, 232 Ala. 184, 167 So. 731; Atlantic Coast Line v. Brackin, 248 Ala. 459, 28 So. 2d 193; Central of Ga. Ry. Co. v. Ellison, 199 Ala. 571, 75 So. 159; Pollard v. Nicholls, 5 Cir., 99 F. 2d 955."

It thus appears that the only ruling of the Court of Appeals is a ruling upon the sufficiency of the evidence to go to the jury, and in support of that ruling the Court of Appeals made a summary of the matters appropriate to be considered by the jury in the following language:

> "It was also the duty of the railroad company to exercise reasonable care for the safety of travelers on

the highway, and to have its train under control appropriate to the circumstances involved. Weatherly v. Nashville C. & St. L. Ry., 166 Ala. 575, 51 So. 959; Atlantic Coast L. v. Jackson, 221 Ala. 646, 130 So. 388; Davis v. Smitherman, 209 Ala. 244, 96 So. 208. In determining whether or not the railroad company performed that duty, it is appropriate to consider, amongst other things, the character and location of the crossing; the extent of its use by the public; the speed of the train; the distance traveled by the train before stopping after discovering plaintiff's peril; whether or not a crossing signal was given in compliance with Ala. Code, 1940, Title 48, Sec. 170; the nature and extent of the obstructions to the view of a traveler on the highway, and to the engineer of the train, approaching the crossing in the manner here involved; the extent to which existing weather conditions may have reduced visibility or affected the slowing of the train upon discovery of deceased's position of peril; the alertness of the engineer in discovering deceased's peril and in stopping the train; the condition of traffic on the highway; the fact that of other persons in the vicinity some heard the signals but some did not; and that another traveler heard them and safely stopped his car. These and other matters which might be appropriately considered upon the question of the railroad's negligence vel non, are typical matters for jury appraisal. The engineer testified that he did not discover the deceased's peril in time to avoid the fatal collision. But the jury might have inferred from the circumstances that he did or that he would have discovered it had he exercised due care. Action of the engineer a split second sooner would have averted the collision. Louisville & Nashville Ry. Co. v. Sullivan, 244 Ala. 485, 13 So. 2d 877, 880; Central of Ga. Ry. Co. v. Motherwell, 227 Ala. 300, 149 So. 820; Southern Ry. Co. v. Dear, 26 Ala. App. 508, 162 So. 685.

> "It cannot be said as a matter of law that the negligence of the driver of the car was the sole proximate cause of the collision, nor that the defendant was free from negligence. The evidence on these questions is conflicting. Reasonable minds might differ thereon. There is sufficient evidence, if believed, to support the jury's finding that the defendant was guilty of negligence."

It will be noted that the record shows that defendant, by acquiescence, admitted the crossing in question to be "a populous crossing" (Rec. p. 45); that according to the undisputed evidence plaintiff's deceased intestate was a passenger in the automobile involved, and by the undisputed evidence not chargeable with any contributory negligence. There was evidence bearing upon each matter which the Court of Appeals in Paragraphs (3, 4) of its opinion said were matters proper to be considered in determining whether or not the railroad performed its duty of due care.

The petitioner has failed to show this court any applicable decision of the Supreme Court of Alabama contrary to any holding of law set out in the opinion of the Court of Appeals here sought to be reviewed.

Petitioner seeks to lean upon the opinion of the Supreme Court of Alabama in the case of A. C. L. R. Co. v. Barganier, rendered January 3, 1952 (more than a year after the trial in District Court, and nearly a month after the opinion of the Court of Appeals was rendered), to support his argument that the trial court and the Court of Appeals decided "an important question of local law in a way probably in conflict with applicable local decisions." Surely the District Court nor the Court of Appeals could not be held to possess powers of clairvoyance and be able to follow a decision of the local courts rendered long after their decisions were rendered.

However, there is no conflict in the Barganier decision and the decision of the Court of Appeals on any question of local law. Petitioner consumes twenty-two and one-half pages of a forty-five page brief printing the views of Justice Brown as the opinion of the court, when the per curiam opinion of the entire court, with the exception of Justice Brown, refused to concur in Judge Brown's opinion in many features and limited the reversal of the case to the holding that due to the contributory negligence of the plaintiff, the court should have given the affirmative charge on the negligence count, thereby indirectly holding that there was sufficient evidence of the defendant's negligence to go to the jury, but that plaintiff could not recover for the reason that under Alabama law any contributory negligence on the part of the plaintiff proximately contributing to his injury defeats his recovery. As to the wanton count the per curiam opinion limited its reversal of the court below on that count solely to the question of joining the master and servant involved, viz., the count sounded in trespass and, under the ruling in Sibley v. Sibley, in manuscript at that time, the railroad company and its employee engineer could not be joined in a wanton count, notwithstanding the Act of October 9, 1947 (Sec. 138-1, Title 7, Code of 1940, Pocket Part). The Barganier opinion is now on rehearing and is not a final opinion of the Supreme Court of Alabama at the present time. Our case is differentiated from the Barganier case, supra, in the following particulars:

(a) Our plaintiff's deceased intestate was a passenger and under the undisputed evidence could not be guilty of contributory negligence.

(b) Our complaint did not join the engineer and the company and was not subject to the criticism that the master and servant were both joined in the wanton count contrary to the decisions of the Supreme Court of Alabama in City Delivery v. Henry, 139 Ala. 161, 34 So. 389, and

other cases cited by the Supreme Court of Alabama in the case of Sibley v. Sibley, Sixth Division, 158, manuscript.

(c) It was admitted in our case that the crossing was a populous crossing (Rec. p. 45).

So, even if the Barganier case were determined on rehearing in the Supreme Court of Alabama and had been rendered prior to the trial of this case in the District Court, it does not clearly appear that the holding of the Court of Appeals is contrary to the Barganier per curiam opinion (Petitioner's brief, pp. 43-44).

So, the petitioner cannot look to the Barganier case for support in his effort to invoke a discretionary power of the Supreme Court to issue its writ of certiorari on the ground that the Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions."

Petitioner cites no other Alabama case which he claims to be in conflict with the ruling of the Court of Appeals that the trial court correctly submitted this case to the jury and correctly overruled the motion for new trial.

B.

We have cited authorities in our Points of Law to the effect that the Supreme Court will not set aside the ruling of a lower Federal Court in applying local laws, except on a plain showing of error (Point I), and that the Supreme Court does not grant writ of certiorari to Court of Appeals to review evidence and to discuss specific facts (Point II), and that the Supreme Court of the United States is particularly hesitant in overruling a decision by the Court of Appeals on the law of particular states, unless their conclusions are shown to be unreasonable when such opinions are rendered by judges who are constantly required to pass upon the law of the state involved, and who have had

long experience in the practice of the law in the state whose local law is involved (Point III).

C.

In support of the ruling of the Court of Appeals that the trial court was correct in submitting the matter to the jury and in denying the motion for new trial, we direct the attention of the Supreme Court of the United States to the many different authorities cited by the Court of Appeals at the conclusion of its opinion, and particularly to those authorities which we have cited in support of our Points IV to XVII, inclusive.

This action was brought by the appellee as administratrix of the estate of Murphy Hill Freeman, deceased, under what is generally termed the Alabama Wrongful Death Statute, Title 7, Sec. 123, Alabama Code of 1940. The collision in question occurred at a point where appellant's tracks, between Birmingham and Bessemer, cross a populous and frequently traveled highway known as the Midfield-Fairfield Highway. There was an abundance of evidence introduced upon the trial to show that this particular crossing was surrounded by populous communities and was used with great frequency at all times by the general public and was what is termed in many of our cases as a "populous crossing" (Rec. pp. 24, 25, 26, 33, 42, 43, 44, 45). The character of the crossing as a populous and dangerous crossing was not made an issue by the appellant upon the trial of this cause and the appellant conceded that it was a populous and dangerous crossing used with great frequency by the general public and had been so used for a long time prior to the date of the collision (Rec. p. 45). The trial judge so ruled that the evidence was sufficient in this respect and called upon the appellant to state whether or not the appellant was going to make any issue in this regard and the appellant sat

silently by and acquiesced in the ruling of the trial court in this connection. It has been held many times, and is a recognized principle in federal practice, that in the trial of a cause any facts admitted by counsel may be the grounds of the court procedure equally as if established by clearest proof. **France Manufacturing Co. v. Jefferson Electric Co.**, 106 Fed. (2d) 605, Cert. Den. 60 Sup. Ct. 471, 309 U. S. 657, 84 L. Ed. 1006, Rehearing Denied 60 Sup. Ct. 589, 309 U. S. 696, 84 L. Ed. 1036; Fontes v. Porter, 156 Fed. (2d) 956; Kansas City Life Ins. Co. v. Bowns, 129 Fed. (2d) 287; Conn v. Penn, 18 U. S. 424, 5 Wheat. 424, 5 L. Ed. 125; General Electric Co. v. Wagner Electric Manufacturing Co., 123 Fed. 101, Affmg. 130 Fed. 772, 66 C. C. A. 82. And appellant did, by its silence and acquiescence, waive any right to question the ruling of the court in this connection. The court acted upon appellant's conduct and made it the basis of the court's procedure and denied appellee the right to offer any more evidence in that connection. Appellee cannot understand the appellant taking a contrary position on this appeal. It only serves to demonstrate the weakness of appellant's case. This crossing was located just outside of the corporate limits of the City of Birmingham and was between Birmingham and Bessemer and was surrounded by populous communities. This Court will take judicial notice that the population of Jefferson County is 555,000; that the population of Birmingham is 324,074; that the population of Bessemer is 28,471; that the population of Fairfield is 13,219. The engineer admitted on the trial of this cause that he had been operating locomotives continuously over this crossing since 1928, either as fireman or engineer. It has been held many times that such evidence is sufficient to afford an inference of familiarity by the engineer with the crossing; **Gulf Mobile & O. R. Co. v. Sanders**, 51 So. (2d) 531, 532; and that the engineer had knowledge that this crossing was a public crossing that was used with

great frequency by the general public. **Atlantic Coast Line R. R. Co. v. Brackin,** 28 So. (2d) 193. Common sense and everyday understanding will dictate that it is reasonable to infer that a person cannot operate a locomotive over a crossing for twenty-three years without being familiar with the crossing and without knowing its character. The engineer did not deny that he was familiar with the crossing. He testified that as he approached the crossing the train was traveling at a rate of speed between forty-five and fifty miles an hour (Rec. p. 138), and that the speed of the train was not decreased at any time prior to the collision (Rec. pp. 134, 135), but continued working steam to maintain the speed of the train (Rec. pp. 153, 154). Appellant admitted in its answers to appellee's interrogatories that the train was ten minutes behind schedule (Rec. p. 70). There was other evidence which justified the inference that the train was traveling much faster. According to appellant's witness, an employee of the appellant, J. L. Huffman, the train in question, under the condition existing, traveling at forty-five miles per hour, could be stopped in five hundred eighty-one feet (Rec. p. 161). The lever which lifts the pin to uncouple the engine from the first car was bent after the collision (Rec. p. 150). The engine was uncoupled from the coaches and the rear of the train was three hundred to four hundred feet from the crossing when it came to a full stop, and the engine was five hundred or six hundred feet ahead of the train (Rec. p. 103). This was according to appellant's witness, the fireman on the train. According to the testimony of the engineer, the locomotive on the train was sixty-five feet in length and the cars were each seventy feet in length (Rec. pp. 146, 142).

The evidence of J. L. Huffman with reference to his opinion that it would require on an average of two seconds human reaction time and two seconds mechanical reaction time, a total of four seconds on the average, between the

time the engineer commences to apply the brakes and the time they take effect in emergency was merely his opinion as to the average time required in the operations involved and had no binding effect on the jury, he himself stating that it was a variable factor (Rec. p. 162). The jury could use their common experience in determining the time and distance required to slow down or stop the train. Fayet v. St. Louis & S. F. R., 81 So. 671, 203 Ala. 3. The undisputed evidence of all of the witnesses is that the automobile had practically cleared the crossing at the time of the collision and that the locomotive struck the extreme rear of the automobile and demolished it and that it would have taken the automobile only an infinitesimal fraction of a second to have gone beyond the point of danger.

The evidence in this case authorized the jury to find that the locomotive traveled a maximum of 1275 feet past the crossing involved (Rec. pp. 103-146), and since the defendant's own witness testified that the train could be stopped at forty-five to fifty miles in a train of 581 feet, the jury might have inferred much greater speed since the required distance for stopping was not less than 1075 feet, and not more than 1275 feet under the evidence (Rec. p. 103) (Rec. pp. 146-142).

In the case of **Atlantic Coast Line R. R. Co. v. Brackin**, 28 So. (2d) 193, it was affirmatively held that evidence as to a train being operated at a high and dangerous rate of speed of forty to fifty miles an hour over a public crossing that was used with great frequency by the general public warranted a submission of both negligence and wantonness to the jury where the engineer had been operating trains over the crossing for a number of years, thus affording the basis for the inference that he was familiar with the crossing, and had knowledge that the crossing was used with great frequency by the general public and that people or property were likely, probably,

in an exposed position at or about the crossing, and the Supreme Court of Alabama correctly held that the Circuit Court did not err in refusing the affirmative charges requested by the defendant, or in overruling defendant's motion for a new trial.

There was sufficient evidence of negligence on the part of the engineer, after discovery of intestate's peril, to support the verdict under either of counts One, Two or Three. Herbert Foster, a witness for the plaintiff, testified that he was following the automobile involved in the collision in which appellee's intestate was riding as a passenger. He testified that when he first saw the train the train was two hundred feet from the crossing, at which time the automobile was around fifty feet from the crossing and was traveling around fifteen to twenty miles an hour and did not increase or decrease its speed at any time before the collision (Rec. p. 30). This witness further testified that the train did not reduce its speed at any time prior to the collision from the moment he first observed the train until the moment the train struck the extreme rear of the automobile (Rec. p. 31). The undisputed evidence was that the automobile approached the crossing from the engineer's side, or the right side of the train and that the train struck the extreme rear of the automobile (Rec. p. 72). According to appellant's answers to appellee's interrogatories, the engineer operating the locomotive at the time of the collision first saw the automobile when the automobile was seventy-five to one hundred feet from the nearest railroad track (Rec. p. 73), and the locomotive was traveling between forty-five and fifty miles an hour (Rec. p. 76). Walter Johnson, appellant's fireman, testified that the train was traveling, in his opinion, thirty-five to forty miles per hour (Rec. p. 100). The engineer continued to observe the automobile, according to appellant's answers to appellee's interrogatories, from the time he first observed it until immediately

prior to the collision, during which time the automobile continued traveling at the same rate of speed which was, according to appellant's answers, approximately forty miles an hour, without reducing its speed, or increasing its speed, or giving any indication that the driver observed the train, or was aware of the approaching danger (Rec. pp. 76, 82, 87). The engineer, according to appellant's answers (Rec. p. 83) and according to his testimony at the trial, had a plain view of the crossing for a quarter of a mile or more and that, upon approaching the crossing, was looking down the track in the direction of the crossing for a distance of one-half mile before reaching the crossing and continued to travel at a rate of speed of between forty-five and fifty miles an hour (Rec. p. 34), as he approached the crossing, without ever diminishing his speed prior to the accident, but continued to work steam on the engine as he approached the crossing and until the moment of the collision which, he testified, would help maintain the speed of the train (Rec. pp. 153, 154). The only injury to the train, according to the undisputed evidence, was on the left side of the train to the rear of the front of the pilot and to the lift lever which lifts the pin which uncouples the engine tank from the coaches, which was bent (Rec. p. 150). According to the testimony of Walter Johnson, hereinabove stated, the rear of the train was three hundred to four hundred feet from the crossing, when the train came to a stop (Rec. p. 102), and the engine, which was uncoupled from the train (Rec. p. 102), was five hundred or six hundred feet ahead of the train (Rec. p. 102). The length of the cars, as above stated, according to the testimony of the engineer, was seventy feet each and the length of the engine was sixty to sixty-five feet long. Thus, there was substantial evidence that the train traveled around eleven hundred sixty feet after the collision. According to the undisputed testimony the uncoupling of the engine from the train would automatically throw the brakes on in emergency (Rec. p. 153). The testimony of

Walter Johnson was that the train was backed up somewhere between six and eight minutes, maybe ten minutes, after the collision (Rec. p. 103). The witness, Herbert Foster, testified that he did not hear the bell ringing at any time prior to the collision (Rec. p. 37).

Sylvester Penny, who was walking along in the pathway beside the tracks five feet from the train as it passed him and a short distance from the crossing, and who testified that he was paying attention to the train both before it reached him, as it passed him, and until the moment of the collision, testified that he did not hear the bell ringing at any time (Rec. pp. 48, 55). J. B. Renfroe, the conductor on the train, who was in the third car from the engine at the time of the collision, testified definitely that he did not hear any bell ring prior to the collision (Rec. p. 123).

Only the engineer and one member of the train crew testified positively that the bell was rung. One member of the crew was not asked whether the bell was rung and did not testify either affirmatively or negatively in this regard. The correct rule is that the testimony of a witness who was in a position where he would have, in all probability, heard the bell ring, if the bell had been rung, that he did not hear the bell ringing is of sufficient probative value to make a jury question of whether or not the bell was ringing. **Wigmore on Evidence**, 3rd Ed., Vol. II, Sec. 604, p. 778, 1947 Pocket Supp. to Vol. II, page 119; **Chicago & N. W. Ry. Co. v. Burnham**, 124 Fed. (2d) 842, 846; **Louisville & Nashville R. Co. v. York**, 128 Ala. 305, 30 So. 676 (1a); **Nashville C. & St. L. Ry. v. Prince**, 103 So. 463, 212 Ala. 499; **Grand Trunk Western Ry. Co. v. Heatlie**, 48 Fed. (2d) 759. Certainly, the conductor who was on the train at the time and who, according to his testimony, was attentive, would have heard the bell if the bell had been ringing, and in all probability the witness, Sylvester Penny, who was only five feet from the train as it passed him immediately prior to the collision, would

have heard the bell ringing, if it had been ringing. Sylvester Penny testified that he was familiar with the sound or racket that the emergency brakes on a train make when they are applied and that he did not hear the brakes applied at any time from the time he first saw the train under after the collision had occurred (Rec. pp. 48, 49). The engineer did not give the quick, loud emergency blast of the whistle until the train had almost reached the point of the collision, according to the testimony of Sylvester Penny (Rec. p. 50), and according to the testimony of Walter Johnson (Rec. p. 97), and according to the testimony of H. G. Rabon, the flagman on the train (Rec. p. 127). The witness, H. G. Rabon, was the only member of the crew, other than the engineer, who testified that the bell was ringing, and the witness Rabon admitted that he did not state to the trainmaster at the time of the investigation immediately after the collision, on the day of the collision, that he heard the bell ringing, but explained that his reason for not so stating was that the trainmaster did not specifically ask him that question (Rec. p. 130). There was no evidence that the engineer sanded the tracks prior to the collision; there was no evidence that the engineer reversed the engine. It was drizzling rain, foggy and cloudy.

The evidence was abundantly sufficient for the jury to infer that the engineer, after he discovered the intestate's peril, did nothing to check the speed of the train.

The Supreme Court of Alabama, in the case of **Central of Georgia Ry. Co. v. Ellison**, 199 Ala. 571, 574, 75 So. 159, quoted with approval the following from the case of **Southern Ry. Co. v. Shelton**, 136 Ala. 191 et seq., 34 So. 194:

> "The important question yet remains: Did the engineer or fireman actually see him in this perilous position? Or, rather, does the evidence we have detailed

afford the basis for an inference by the jury that one or both of them did in fact see him in such position? Both of them testified that they did not see him or anybody on the track at that time and place. But might not the jury find to the contrary notwithstanding? We think so. The jury were not bound to believe or disbelieve their statements that they did not see any one on the track. And the conclusion on the evidential tendencies under consideration would be drawn thus: Shelton was in a position of manifest peril on the track in front of the engine. He was in view of the enginemen. They were looking along the track where he was. Therefore they must have seen him, and this, though they testify they did not."

In the case of **Alabama Great Southern R. Co. v. Moundville Motor Co.**, 4 So. (2d) 305, 241 Ala. 633, the Supreme Court of Alabama observed:

"But, if the engineer, who is under duty to keep a lookout, sees the driver does not stop, look and listen, but proceeds at same speed, apparently heedless of rapidly approaching peril, it cannot be said as matter of law no duty arises to resort to available preventive measures on the part of the engineer.

"If a vigilant man, of reasonable foresight, perceives peril in the situation, a duty of instant action springs up, if any action known to skillful engineers is then available to avert disaster. A sharp warning signal may be a first, and possibly the only preventive measure available, dependent on the circumstances of the particular case. This court has frequently dealt with similar cases. The negligence of the engineer as a proximate cause of the injury is usually a jury question. So it is in this case. Thompson & Donahoo v. Mobile & O. R. Co., 211 Ala. 646, 101 So. 441; Southern R. Co. v. Sherrill, 232 Ala. 184, 167 So. 731; Johnson v. Louisville & N. R. Co., 227

Ala. 103, 148 So. 822; Central of Georgia R. Co. v. Bates, 225 Ala. 519, 144 So. 9; Alabama Great Southern R. Co. v. Sanders, 203 Ala. 57, 82 So. 17."

In the case of **Randle v. Birmingham Railway, Light & Power Co.**, 158 Ala. 532, 537, 48 So. 114, the Supreme Court of Alabama stated as follows:

> "According to the principles of law heretofore announced, it was the duty of the motorman to do all in his power, with the means at hand, to conserve the safety of the intestate, after discovering he was in peril and was unaware of the approach of the car. At what time the motorman discovered intestate's peril, or realized that he was not aware of it, and whether, after discovering the danger of a catastrophe, he exercised the proper degree of care toward averting it, must, of course, be determined from the evidence."

The engineer could not continue to indulge the assumption that the automobile would stop before reaching the tracks on which his train was approaching the crossing after the danger became imminent. **Alabama Great Southern Ry. Co. v. Bolton**, 7 So. (2d) 296, 242 Ala. 562.

In the case of **Southern Ry. Co. v. Sherrill**, 167 So. 731, 232 Ala. 184, the Supreme Court of Alabama, in affirming a judgment for the plaintiff, stated:

> "The duty of an engineer, on discovery of peril of one on or near the track, is covered by the decisions. Louisville & N. R. Co. v. Calvert, as Adm'r, 172 Ala. 597, 55 So. 812. In Thompson & Donahoo v. Mobile & O. R. Co., 211 Ala. 646, 101 So. 441, it was declared that the engineer's duty toward the driver of a truck approaching a crossing began when he discovered the peril of the truck, which depended, not on the moment he first saw the truck, but on the relative distances

from the crossing, relative speeds of train and car, relative stopping distances, and the presence or absence of movements or apparent movements to stop the truck proceeding toward or on the crossing. The following observation was made in that case:

> " 'The duty of the engineer, now under review, began when he discovered the peril of the truck. This may or may not be the same moment he first saw the truck. The relative distances from the crossing, relative speeds, relative stopping distances, the presence or absence of movements or apparent movements to stop the truck, all enter into the inquiry whether there was apparent danger of a collision. In such conditions a collision, or no collision, often depends on the doings of only a few seconds. The measure of duty is that of careful, prudent men in view of the imminence of danger. When peril appears, the engineer must use all means known to skillful men in his position to avert an accident.' 211 Ala. 646, 647, 101 So. 411, 442.

"These are questions for the jury.

"The failure to give 'a quick, loud blast of the whistle' to warn of danger held sufficient to make a jury question in Snider v. Alabama Great Southern R. Co., 210 Ala. 119, 97 So. 209; Alabama Great Southern R. Co. v. Sanders, 203 Ala. 57, 82 So. 17; Alabama Great Southern R. Co. v. McWhorter, 156 Ala. 269, 47 So. 84.

"In Mobile Light & R. Co. v. Gadik, 211 Ala. 582, 100 So. 837, 839, it was said:

> " 'The law exacts a high degree of care of a motorman upon discovery of peril to persons or property at a public crossing—a care measured by the duty to protect life and property. He

should be watchful, alert, and capable; must promptly use all the means known to persons of skill in his position to avoid an accident. The moment of time when these new duties begin cannot well be better defined than by the natural import of the words, "upon discovery of peril." An automobile seen approaching a crossing at a safe distance and at usual speed does not within itself suggest peril. The driver may be taken to have the use of his senses, and to exercise the ordinary care which the occasion demands. But, if the automobile continues to approach without showing up, or the driver is seen to be inattentive, so that the situation suggests a probable collision unless prompt measures are taken, the duties of the motorman begin. One of the duties is usually to give a warning signal. If the automobile driver appears inattentive to the approach of the streetcar, this is an urgent duty. It should be given before it is too late to avoid a collision.'

"Touching the duty of an engineer, it was declared in Johnson v. Louisville & N. R. Co., 227 Ala. 103, 148 So. 822, that such engineer could not indulge the assumption that the motorist approaching the track at the crossing would not go on the track beyond the time when his danger become imminent; that until it became apparent to the engineer that the motorist was unaware of the train's approach and that his automobile would probably enter the zone of danger, it could not be said that the engineer discovered the motorist's peril, and if this peril was discovered in time to sound the warnings at hand and the engineer failed to do so, he was guilty of subsequent negligence; that the motorist had the burden, under a count charging subsequent negligence, of proving that negligence of the engineer proximately caused his injury."

Actual knowledge of peril as a basis for subsequent negligence and the failure of the engineer to employ the means at hand to avoid the accident may be inferred by the jury from all of the facts and circumstances attending the collision and the conditions existing after the collision. **Southern Ry. Co. v. Williams**, 243 Ala. 429, 10 So. (2d) 273.

Although the engineer testified that he did not discover intestate's peril in time to avoid the fatal collision, the jury may infer that he did. **Central of Georgia Railway Co. v. Motherwell**, 227 Ala. 300, 149 So. 820; **Central of Georgia Ry. Co. v. Ellison**, 199 Ala. 571, 75 So. 159; **L. & N. Railway Co. v. Sullivan**, 13 So. (2d) 877, 880, 244 Ala. 485.

In the case of **Southern Railway Co. v. Dear**, 26 Ala. App. 508, 512, 162 So. 685, the Court of Appeals of Alabama quoted from the case of **Louisville & Nashville R. Co. v. Calvert, Admr.**, 172 Ala. 597, 55 So. 812, 814, as follows:

> "In the Calvert Case, supra, it was said: 'There was proof that the right of way was clear, and it was not only a question for the jury, but is a matter of common knowledge, that if one looks a considerable distance ahead, though the eye is aimed at a certain point or object, that the sight will take in to some extent the surrounding or adjacent space, and it was open to the jury to determine that the engineer discovered the horse and buggy approaching the crossing and before the collision.' "

And the Court further stated in the **Dear** case, supra, that:

> "It, therefore, appears that there was evidence to be considered by the jury to enable them to determine whether or not the engineer discovered plaintiff's peril in time to have averted striking him by preventive means, and whether or not the failure of the engineer to resort to such means was the proximate cause of plaintiff's injury and damage. Under the

evidence the jury could have inferred that the engineer discovered the perilous position of the plaintiff upon defendant's railroad track in time to slacken or check the speed of the train, so as to enable the automobile to clear the track before the train reached the crossing."

In the case of **Louisville & Nashville R. Co. v. Scott**, 23 Ala. App. 132, 122 So. 184, the Court of Appeals of Alabama, affirming a judgment for the plaintiff rendered on a complaint charging negligence and wantonness, held:

"We recognize the rule so clearly stated in Young v. Woodward Iron Co., 216 Ala. 330, 113 So. 223, that 'knowledge of peril, as an essential predicate for guilt of subsequent negligence,' is necessary, and that the **knowledge** referred to means **actual** knowledge, but, where there are facts from which the jury may reasonably infer that the defendant's trainmen had such knowledge, it becomes the duty of those in charge of the operation of the train, after discovering the peril of a person on the railway track or in dangerous proximity thereto, to use all means at hand to stop or slow down the train in order to avoid the injury, and whether this was done is a question for the jury. L. & N. R. Co. v. Calvert, 172 Ala. 597, 55 So. 812; Saxon v. Cent. of G. R. Co., 192 Ala. 434, 68 So. 313; A. G. S. R. Co. v. Sanders, 203 Ala. 57, 82 So. 17."

And the Court observed in the Scott case, supra:

"Moreover, this accident would not have happened if the defendant's locomotive had been delayed a fraction of a second. So, while the engineer might not have been able to actually bring his train to a stop before reaching the point where plaintiff's car was struck, if prompt action had been taken, the speed of the train might have been so reduced that plaintiff's car would have cleared the danger. Atlantic C. L. R. Co. v. Fannin, 22 Ala. App. 374, 115 So. 850."

This Court, in the case of **Pollard v. Nicholls**, 99 Fed. (2d) 955, held:

> "The testimony of eye witnesses as to the distance the train ran without checking its speed is also competent, and may be sufficient to support a verdict, when taken in connection with the other evidence in the case, including the testimony of the engineer and fireman that the peril was discovered by them * * *."

In that case the Court of Appeals for the Fifth Circuit, construing Alabama law, affirmed a judgment for plaintiff based upon the negligence of the engineer, after discovery of peril, in failing to make use of all means at hand known to skillful trainmen to prevent injury to appellee and her companion, and this Court stated that:

> "It was a light train, consisting of an engine and four passenger coaches, and was equipped with efficient automatic air brakes. The engineer and fireman admitted knowledge of the perilous situation and testified to making due efforts to stop the train, but the failure of the engineer to check its speed before the collision, and the distance the train ran after the event, together with the other facts and circumstances in evidence, were sufficient to warrant the inference by a fair jury that the engineer did not use reasonable care to avoid the injury after discovering the peril. The difference of a few seconds might have enabled the appellee to get the horse off of the track."

In the instant case the difference of a streamlined fraction of a second might have enabled the automobile in which appellee's intestate was riding to go beyond the tracks, as the left side of the train barely touched the extreme rear of the automobile.

Applying the principles of law hereinabove set out, which are apparently well established in the law of Alabama, to all of the evidence adduced upon the trial and

the inferences fairly deducible therefrom, it is clear that there was substantial evidence to support the verdict of the jury under each count of the complaint, and that it was a jury question as to whether the engineer was guilty of negligence proximately contributing to, or wholly causing the death of appellee's intestate, in failing to check the speed of the train in time to avoid the collision and it was a jury question as to whether the engineer was guilty of negligence after the discovery of the perilous situation in failing to sound a quick, loud blast of the whistle, viz.: the emergency alarm, and ring the bell in time to warn the driver of the automobile occupied by appellee's intestate of the approach of the train so that the driver of the automobile might have taken steps to stop the automobile and avoid the fatal collision. It is also clear that it was a question for the jury to decide whether or not the conduct of the engineer, after discovering the perilous situation, was wanton in that the engineer proceeded toward the crossing, after the discovery of the peril of appellee's intestate, with a reckless indifference to the consequences. **Wilhite v. Webb** (Ala.), 46 So. (2d) 414.

The question of contributory negligence is not involved.

Notwithstanding the abundant evidence of negligence which we have cited hereinbefore, the petitioner has sought to get his petition for writ of certiorari determined in the Supreme Court almost entirely upon the question as to whether or not evidence of witnesses that they did not hear the warning signals was sufficient to make a jury question on the issue as to whether or not the engineer gave proper warning signals.

That this testimony made an issue of facts for the jury is the clear holding of the case of **Louisville & Nashville R. Co. v. York**, 128 Ala. 305, 30 So. 676 (12), and **Nashville, C. & St. L. Ry. v. Prince**, 103 So. 463, 212 Ala. 499, and the ruling of the Court of Appeals in this regard is in

entire accord with the applicable decisions of the Supreme Court of Alabama. See other authorities cited in this brief under Point of Law VIII.

The case of **Nashville, C. & St. L. Ry. v. Prince**, supra, is a case where plaintiff was suing for injuries in collision between an automobile and railroad train at a crossing, where no contributory negligence was involved, where defendant railroad company offered the same argument with reference to the negative character of the evidence for plaintiff—many witnesses did not hear or take notice of any signals—and the Supreme Court said that while this furnished good ground for argument before the jury in considering the probative force of testimony, it did make a jury issue and they affirmed the judgment of the court below in favor of the plaintiff, saying that the negative testimony with regard to witnesses not hearing the signals made a case for the jury.

In the case of **Louisville & Nashville R. R. v. York**, 30 So. 676, 128 Ala. 305, the court below refused to give charge numbered 6 to the defendant, and the Supreme Court of Alabama with respect to that action of the trial court stated:

> "We do not think it can be affirmed, as postulated in charge 6 refused to the defendant, that the fact that one in a position to hear a bell does not it is no evidence that the bell was not rung, even though he admits he was 'paying no attention, and that the bell might have rung, and he might not have heard it ring.'" **Louisville & Nashville R. R. v. York**, supra.

There was substantial evidence from which the jury might infer that the engineer saw the automobile approaching the crossing in a manner indicating that the driver was unconscious of his surroundings at a point when the train was at a sufficient distance from the crossing for the

engineer to have taken effective steps to slacken the speed of the train and prevent the collision and was negligent in this regard, or that in the exercise of due care he should have seen it, or that the engineer was indifferent to the consequences after discovering the perilous situation. It will be recalled that Herbert Foster testified that the automobile was traveling fifteen to twenty miles an hour as it approached the crossing. The engineer admitted he saw the automobile seventy-five to one hundred feet from the crossing before the collision and Foster testified that when the train was two hundred feet from the crossing the automobile was fifty feet from the crossing. This evidence, taken in connection with the other evidence hereinabove set forth in this brief, warranted the submission of all counts to the jury.

The Court of Appeals has affirmed the trial court's ruling. In this we submit the Court of Appeals was correct.

Applying the general rule that the Supreme Court of the United States will be very loath to disturb findings of fact where they have been made by two separate and distinct courts after full consideration thereof, we respectfully submit that the Supreme Court of the United States should refuse to exercise its discretion in favor of petitioner and should deny the writ of certiorari.

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G. ERNEST JONES, JR.,
Attorney for Respondent.

RODERICK BEDDOW,
G. ERNEST JONES, SR.,
204-211 Massey Building,
Birmingham, Alabama,
Of Counsel.

Certificate of Service.

I, the undersigned attorney of record for the respondent in the above styled cause, do hereby certify that I have on this, the ..... day of April, 1952, served a copy of the above and foregoing Brief and Argument upon the Honorable Peyton D. Bibb, attorney for petitioner, by mailing a copy thereof, with proper postage affixed, addressed to him at 1115 First National Building, Birmingham, Alabama.

.....

G. Ernest Jones, Jr.